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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1088

JAMES J. LAUGHLIN and
ALLAN U. FORTE, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JAMES J. LAUGHLIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James F. Fitzpatrick
1229 Nineteenth Street, N.W.
Washington, D.C.

Ralph J. Temple
1424 Sixteenth Street, N.W.
Washington, D.C.

Attorneys for Petitioner

Of Counsel:

Wm. Warfield Ross
National Capital Area Civil Liberties Defense and Education Fund

Lawrence Speiser
Melvin L. Wulf
American Civil Liberties Union

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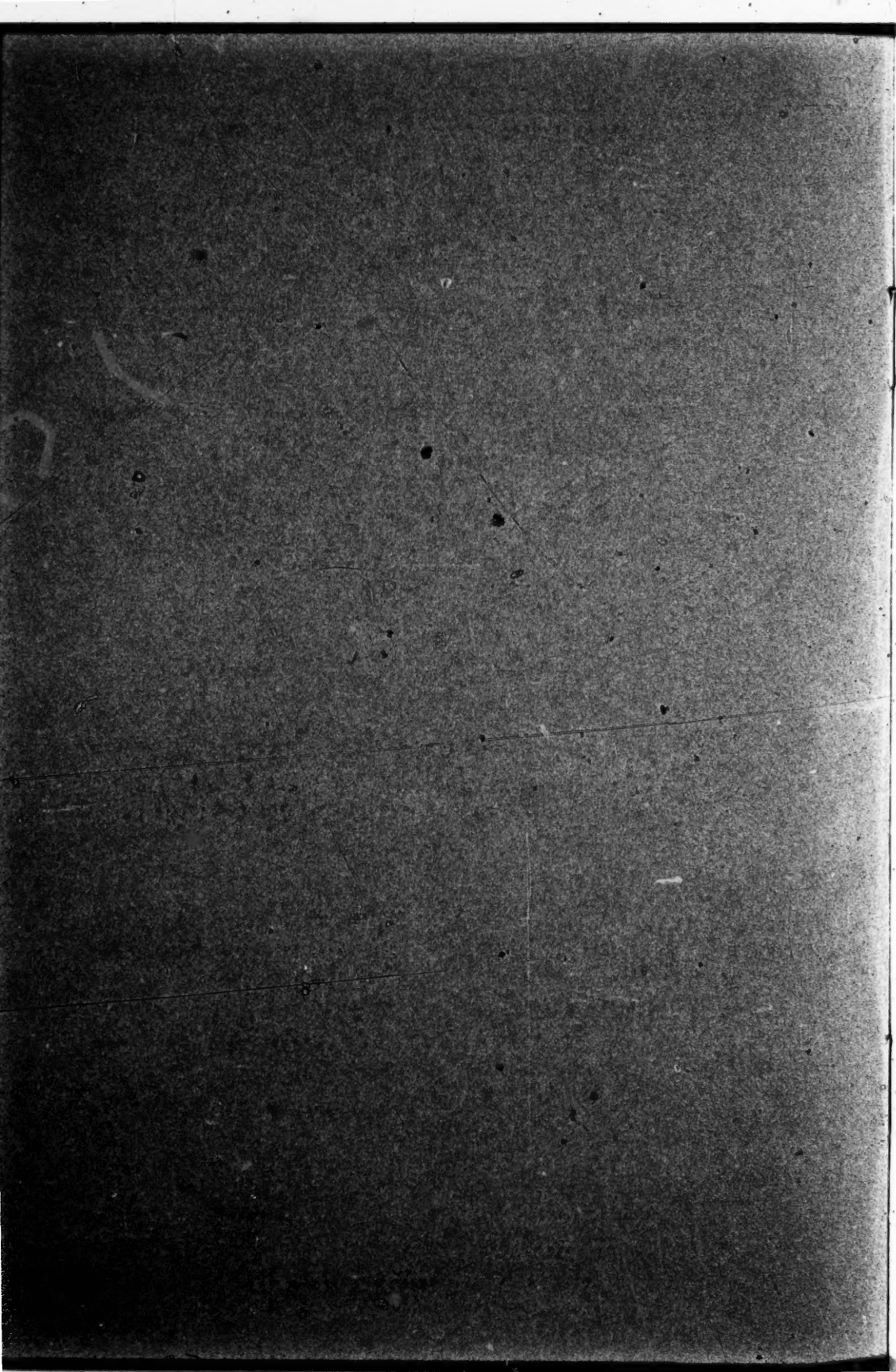


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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners James J. Laughlin and Allan U. Forte pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cases on July 28, 1967.

CITATIONS TO OPINIONS BELOW

This petition seeks review of two related decisions of the court of appeals. The first involved a conviction of Petitioners Laughlin and Forte on a charge of conspiracy to obstruct justice and endeavoring to influence a witness (herein "the conspiracy charge"). 385 F.2d 287 (D.C. Cir. 1967). The second involved a conviction of Petitioner

Laughlin for perjury (herein "the perjury charge"). 385 F.2d 295 (D.C. Cir. 1967). The court of appeals had previously reversed an earlier conviction on the conspiracy charge, 344 F.2d 187 (D.C. Cir. 1965). The district court has also dismissed the initial perjury indictment because of the presentation of illegal wiretap evidence to the grand jury. *See* 222 F.Supp. 264 (D.D.C. 1963); 223 F.Supp. 623 (D.D.C. 1963); 226 F.Supp. 112 (D.D.C. 1964).

JURISDICTION

The judgments of the court of appeals were entered on July 28, 1967. A timely petition for rehearing *en banc* was denied on December 26, 1967. Mr. Chief Justice Warren extended the time within which to file this petition to and including February 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Grand Jury's reliance upon illegal wiretap evidence in returning the conspiracy indictment violates the Fourth and Fifth Amendments to the Constitution, contravenes the Exclusionary Rule, and therefore requires dismissal of the Indictment.[1]

2. Whether, as a matter of Due Process and pursuant to the Exclusionary Rule, a defendant has standing to move to exclude incriminating testimony of a witness, where such testimony has been unlawfully coerced.[2]

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[1] This question is presented only in the conspiracy convictions, Nos. 19562-63, below.

[2] This question is presented both in the conspiracy convictions, Nos. 19562-63, below, and the perjury conviction, No. 20327, below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonble searches and seizures, shall not be violated . . ."

Fifth Amendment to the Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor be deprived of life, liberty, or property, without due process of law . . ."

Section 605, Communications Act of 1934, 47 U.S.C. § 605:

> " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

STATEMENT OF THE CASE

In order to place the constitutional issues raised here in proper context, it is necessary to trace briefly the background leading to the instant prosecutions. In 1961, petitioner Forte was indicted and tried on a charge of abortion. Petitioner Laughlin was his counsel. Forte's defense centered on his assertion that the abortion charge was a fabrication and part of a "shakedown" engineered by Detective Wallace, a Washington, D. C. policeman. Forte's trial ended in a verdict of acquittal. His accusations as to the "shakedown" triggered a grand jury investigation into these charges. *See,* 385 F.2d at 289.

As the court below noted, "the evidence [before the Grand Jury] soon drifted away from the accusation directed at Sgt. Wallace,"[3] and the investigation focused upon

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[3] 385 F.2d at 289.

the conduct of petitioners.[4] The most significant witness before the grand jury was a Baltimore policewoman, Mrs. Bernice Gross, who on her first appearance before the grand jury on the morning of March 1, 1963 testified that she had no connection with petitioner Forte or Detective Wallace.

Immediately following that testimony, Mrs. Gross was taken into the office of the United States Attorney and interrogated for about two hours. The transcript of that interrogation, which tends to prove that Mrs. Gross was coerced to change her story, is set forth in pertinent part in Appendix C. The court of appeals acknowledged that Mrs. Gross' statements were "obtained under possible coercive circumstances." 385 F.2d at 293. In this connection, the court of appeals noted that the prosecutor:

> " . . . warned that [Mrs. Gross] might be prosecuted for perjury unless she told 'the truth about what happened.' The Assistant United States Attorney in charge of the grand jury proceeding, . . . promised that he would ask the grand jury to be lenient in considering Mrs. Gross's part in dealing with Mrs. Smith, if it appeared that Mrs. Gross would be a witness against Laughlin and Forte." 385 F.2d at 289-90.

Mrs. Gross was forthwith brought back before the grand jury where she reversed her story and asserted that she had attempted to dissuade a witness from testifying.. 385 F.2d at 290. Then the prosecutor asked, in the presence of the grand jury, if Mrs. Gross would make telephone calls to petitioners Laughlin and Forte and allow the Government to record the conversations. Mrs. Gross first refused; then, fol-

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[4] In this connection, the court of appeals noted,

> ". . . we are at least surprised that Wallace, who was himself an object of the grand jury's investigation, should be used as an investigator. The effect may well have been equivalent to an endorsement of his trustworthiness by the United States Attorney's Office." 385 F.2d at 292.

lowing threats from the Deputy Foreman of the grand jury, she acquiesced. *Ibid.* It was this "consent" which the courts below found was coerced, with the result that the wiretaps were illegal.

Four telephone calls from Mrs. Gross to Laughlin were illegally intercepted by the Government. At least one of them, and possibly all of them, were played to the grand jury. 385 F.2d at 290; 344 F.2d at 189.

It should be emphasized that the grand jury not only *received* the illegal wiretap evidence, but actively participated in *procuring* it. The record in this case makes it absolutely clear that the statements of the Deputy Foreman of the grand jury constituted a major element in the coercion of Mrs. Gross to consent to the illegal wiretap. The key instance of such coercion, referred to specifically by the district court, came in the following colloquy between the Deputy Foreman, the prosecutor, and Mrs. Gross:

> "DEPUTY FOREMAN: [Mr. Prosecutor], I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room, that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.
>
> "[PROSECUTOR] : Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?
>
> "A. Okay."

(*See*, 222 F.Supp. at 267).

Significantly, Judge Youngdahl found that the grand jury was an active participant in securing the illegal evidence:

> " . . . the statements of both [the prosecutor] and *the deputy foreman of the grand jury*, as quoted above, amounted to an implied promise that if Mrs. Gross consented to having the recordings made, she would not be indicted for perjury. Thus there was a clear 'hope of leniency', *supra*, in Mrs. Gross's mind, which hope was deliberately created by the implied promises of both [the prosecutor] *and the deputy foreman*. Her consent, under the implied threat of being indicted if she did not cooperate and under the implied promise that she would not be indicted if she did cooperate, is not the kind of 'authorization' contemplated by 47 U.S.C. § 605, as Weiss makes abundantly clear. Mrs. Gross has not been indicted by the grand jury." 222 F.Supp. at 268-69. (Emphasis added.)

The grand jury returned two indictments.[5] The first was the conspiracy charge against both petitioners; Mrs. Gross was charged as a co-conspirator, but was not indicted.[6] The

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[5]There can be no question that the wiretaps had a significant effect upon the Grand Jury. The interplay of the illegal wiretaps with the testimony of the witnesses who had appeared before the Grand Jury has already been discussed in a decision reversing petitioners' initial conspiracy conviction, 344 F.2d 187. That decision considered the prejudicial effect, *at trial*, of the introduction of the illegal wiretaps. There is no justifiable distinction, we believe, between the effect of these recordings upon the petit jurors and grand jurors. After reviewing the evidence presented at trial, the court made the following finding on the impact of the illegal recordings:

> "In the recorded conversations, the parties apparently assume the occurrence of the transactions which Mrs. Gross had related. After hearing the recordings, the jury would certainly tend to give more credence to Mrs. Gross' entire testimony than if they had not heard them. Since the conviction of appellants on each count depended heavily on the testimony of Mrs. Gross, we cannot say that there was not 'a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Id.* at 192-93.

[6]The conspiracy charge asserted that petitioners had conspired to influence the actions of Mrs. Smith as a material witness in the abor-

second indictment was the perjury charge against petitioner Laughlin.[7]

The two issues raised by this petition were squarely considered in the proceedings below. The question of the illegal wiretap evidence initially was raised on petitioner's first trial for perjury. There, the wiretaps were introduced, over objection, as evidence that Laughlin knew Mrs. Gross. The district court found that the recordings were illegally obtained, declared a mistrial, 222 F.Supp. 264, and dismissed the initial perjury indictment because:

> "Evidence was presented to the Grand Jury in this case which was in disregard of the accused's rights and was obtained even in the face of 47 U.S.C. § 605." 226 F.Supp. at 114.

In this regard, the district court found that:

> " . . . there may be competent evidence and illicit evidence before the grand jury and the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the grand jury did not in fact return the indictment primarily influenced by the illicit evidence. That the Court considers the case here." *Id.*

The district court refused, without amplification, to dismiss the companion conspiracy indictment at that time. 223 F.Supp. at 626. At the first conspiracy trial the Government again introduced the illegal wiretaps in evidence, even though they had previously been declared illegal in the perjury trial. After conviction, the court of appeals reversed. 344 F.2d 187.

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tion case against Forte. It also charged each petitioner with the substantive offense of corruptly endeavoring to influence witness Smith. 18 U.S.C. §§ 371, 1503.

[7]The perjury charge was based on Laughlin's denial to the Grand Jury that he had ever talked to Mrs. Gross. 18 U.S.C. § 1621. *See* 222 F. Supp. at 264.

On remand, petitioners again moved to dismiss the conspiracy indictment "for the reason that unlawful evidence was used before the Grand Jury . . . ." Plaintiff's Motion To Dismiss the Indictment, Cr. 600-63, dated May 7, 1965. The Government conceded that unlawful evidence "was indeed placed before the grand jury which returned the [conspiracy] indictment . . . ." Government Memorandum in Opposition to Motion To Dismiss the Indictment, Cr. 600-63, dated May 19, 1965. On May 24, 1965, the court denied the motion to dismiss, without opinion.

The second issue, the standing to challenge coerced testimony from a witness, was raised in both prosecutions. At the second perjury trial, petitioner attempted, without success, to exclude Mrs. Gross' testimony on the ground it was coerced. The Government responded that even though the testimony was coerced, this raised only the question of credibility, not exclusion, of her testimony.[8]

Likewise, this issue was raised in the conspiracy trial. There, "[t]he Government's case consisted basically of the testimony of Mrs. Smith and Mrs. Gross, which was generally consistent with their testimony before the grand jury." 385 F.2d at 291. Petitioners moved to exclude Mrs. Gross' testimony on the ground it was coerced.[9] The court rejected that argument, holding:

> THE COURT: "... let's assume it was coerced from her at the time by the United States' Attorney's Office. . . . Yet if she was in here and is willing to take the witness stand and testify to the very same

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[8] In his Motion to Dismiss the Indictment, Cr. No. 406-65, dated Jan. 27, 1966, petitioner Laughlin asserted that the "use of coerced testimony against defendant violated the due process clause. . . ." *And see,* Government Response to Motion to Dismiss, Cr. 406-65, dated Feb. 16, 1966, p. 22 (petitioner "would have no standing to exclude her testimony.") *See also,* Transcript, Cr. No. 406-65, pp. 1285-88.

[9] Transcript, Crim. No. 600-63, p. 203.

> facts, doesn't it go to the weight the jury should give rather than its admissibility.
>
> * * *
>
> THE COURT: " . . . What you are really coming down to, then is, was this evidence that she would give coerced out of this witness by the United States Attorney.
>
> * * *
>
> "I am going to hold, that that goes to the weight and the credibility. And it will be heard in front of the jury, and you can argue on it. You can argue the weight."*10*

The Government below defended that ruling on the ground that "even if appellants had shown that Mrs. Gross had been coerced into testifying, appellants would not [have] standing to object to her testimony." Brief for Appellee, Nos. 19562-63, Ct.App.D.C., p. 34.

Two separate panels of the court of appeals heard the appeals which raised essentially the same issues. On July 28, 1967, the panel reviewing the conspiracy convictions filed an opinion, 385 F.2d 287, which held:

(i) that even though the prosecutor had presented illegal wiretap evidence to the Grand Jury, which had relied upon it in returning its indictment, as long as there was "ample competent evidence" before the Grand Jury, the use of the illegal evidence was essentially "harmless error" and the indictment was valid, and

(ii) that petitioners had no standing to exclude Mrs. Gross' highly-incriminating testimony which petitioners assert was coerced; their only remedy was to challenge the credibility of Mrs. Gross.

The panel reviewing the perjury conviction affirmed *per curiam*, 385 F.2d 295.

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*10*Transcript, Crim. No. 600-63, pp. 218, 223.

REASONS FOR GRANTING THE WRIT

I.

The Grand Jury's Use of Illegal Evidence in Returning the Conspiracy and Corruption Indictment

The fundamental issue here is whether the *Costello* decision,[11] which permits the use of inadmissible evidence before the grand jury, also sanctions the use of illegal evidence before the grand jury. In considering this question, lower courts have developed conflicting and widely differing standards.

There can be no question here that a central element in the prosecutor's presentation to the Grand Jury leading to the return of the conspiracy indictment was the introduction of recordings which have been held, beyond any dispute, to be illegal wiretaps in violation of Section 605 of the Communications Act of 1934. *Laughlin v. United States*, 385 F.2d at 291; 344 F.2d at 192; 226 F.Supp. at 114; 223 F.Supp. at 625, 626; 222 F.Supp. at 268-69. Indeed, the Grand Jury's reliance upon this same illegal wiretap evidence earlier led Judge Curran to dismiss the original perjury indictment. 226 F.Supp. 112; 223 F.Supp. 623.

The Court should grant certiorari to consider whether the conceded use of illegal wiretap evidence before the grand jury is consonant with controlling constitutional and exclusionary standards.

A. *The Rulings Below Sanctioning Use of Illegal Wiretap Evidence Before the Grand Jury Are Contrary to this Court's Decisions Excluding Illegal Evidence.*

This petition raises serious and significant questions as to the scope and integrity of the Exclusionary Rule which this Court fashioned in *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 302 U.S. 379 (1937); 308 U.S. 338 (1939); and *Elkins v. United States*, 364 U.S.

[11] *Costello v. United States*, 350 U.S. 539 (1956).

206 (1960). There can be no question that the rulings of this Court require the exclusion of illegal wiretap evidence at all stages of the criminal trial. Consistent with a due regard for fair procedures, the Solicitor General has stated that "the Federal Government has abandoned the use of electronic eavesdropping for prosecutorial purposes." *Berger v. New York*, 388 U.S. 41, 62 (1967). Further, although the exclusionary policy as to wiretap evidence in the past has rested upon statutory grounds, the recent *Berger* and *Katz* decisions make it abundantly clear that the statutory restrictions against intercepting telephone conversations have a constitutional foundation.[12] *Berger v. New York, supra; Katz v. United States*, ___ U.S. ___ (1967). As the Court stated in *Berger*,

> "Federal law, ... prohibits interception and divulging or publishing of the content of wiretaps *without exception.*" 388 U.S. at 48. (Emphasis added.)

We believe that the Exclusionary Rule must properly apply to grand jury proceedings, the initial formal stage of the criminal prosecution, just as it does at trial. In explaining the Exclusionary Rule, the Court has stated:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States, supra*, 364 U.S. at 217.

In terms of "removing the incentive" and denying the prosecutor the benefit of illegal evidence, there is no justifiable distinction between the indictment stage of a proceeding and the trial stage. In this connection, it has been observed that, "To the extent that the grand jury provides a forum

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[12] It is noteworthy that the Government below indicated that the violation of constitutional rights, as contrasted with statutory rights, might be sufficient to vitiate the indictment. Government's Memorandum In Opposition to Motion to Dismiss the Indictment, Cr. 600-63, May 19, 1965.

in which illegally obtained evidence can be utilized, the exclusionary policy articulated in *Weeks v. United States*, 232 U.S. 383 (1914), will be undermined."[13]

This issue has never before been squarely considered by the Court.[14] However, in the 1966 Term, the Solicitor General implicitly acknowledged the constitutional issue raised by using illegal evidence to influence a grand jury's decision. See *West v. United States*, No. 215 Misc., Oct. Term 1966, Brief for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari. There, the Solicitor General emphasized that in the factual situation in *West*, there could not have been any prejudice because the illegal evidence did *not* relate to the count of the indictment on which petitioner was tried and convicted.[15] However, the Solicitor General distinguished the *West* case in the following critical terms:

> "There is no basis, therefore, for concluding that the suppressed evidence influenced the grand jury's decision to indict with respect to the transfer charge. [The *West*] case thus does not present the question

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[13]Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 Yale L.J. 590, 595 (1963). The Court of Appeals for the Eighth Circuit has reached the opposite conclusion. *West v. United States*, 359 F.2d 50, 56 (8th Cir.1966), *cert. denied*, 385 U.S. 867 (1966). However, in that case it was conceded that the illegal evidence had no connection whatsoever with the count of the indictment upon which West was tried.

[14]In the venerable decision of *Holt v. United States*, 218 U.S. 245, 247-48 (1910), in an ambiguous factual situation, the Court refused to dismiss an indictment where "evidence in its nature competent, but made incompetent by circumstances [not otherwise defined], had been considered along with the rest" by the grand jury. *Id.* at 248. Significantly, *Holt* was decided four years before *Weeks v. United States, supra*, which established the federal exclusionary rule for illegally seized evidence.

[15]A separate count based upon illegal evidence was dismissed by the trial court.

whether an indictment wholly or substantially based upon illegally seized evidence can support a conviction." *Id.*

The instant petition, of course, squarely presents the very question whether an indictment "substantially based upon illegally seized evidence can support a conviction."

Moreover, in *Lawn v. United States*, 355 U.S. 339 (1958), the Court considered only the issue of whether the "unsupported suspicion" that illegal evidence had been used before the grand jury was sufficient to require the trial court to convene a full evidentiary hearing to review the grand jury proceedings. The Court emphasized that defendants there had laid "no foundation" for a hearing.[16] 355 U.S. at 349. In the instant case, of course, there is no need to rely on "suspicion." It is conceded that unlawful wiretap evidence was presented to, and relied upon by, the Grand Jury.

Finally, in the recent decision in *United States v. Blue*, 384 U.S. 251 (1966), the Court rejected a proposition not at issue here: that the mere fact of securing evidence illegally, without any other use, barred the prosecution entirely and granted defendant complete immunity from prosecution. It was not contended in that case that illegal evidence was ever presented to the grand jury.[17]

Significantly, in the *West*, *Blue* and *Lawn* cases, the Solicitor General did *not* argue that federal prosecutors

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[16] Indeed, the clear inference is that if a foundation *had* been laid, *i.e.*, if there was some persuasive evidence of the use of illegal evidence before the grand jury, then a hearing to consider dismissing the indictment would have been required.

[17] In this factual context, we believe that the statement in footnote 3 to the *Blue* opinion—that "in any event our precedents indicate [that presenting "tainted evidence" to the grand jury] would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether"—was dictum. 384 U.S. at 255. Further, as we point out herein, the precedents relied upon—*Costello* and *Lawn*—do not stand for the cited proposition.

should be free to present illegal wiretap evidence to the grand jury. This is, however, precisely the effect of the appellate decision challenged here.

B. *The Court Should Grant Certiorari To Consider the Effect of the Costello Decision as Applied to Illegal Evidence.*

Costello v. United States, supra, did not sanction the use of *illegal* evidence before a grand jury. It merely permitted grand juries to deliberate unencumbered by "technical rules" of evidence. Thus, *Costello,* upon which the court below relied, affords no justification for the use of illegal wiretap evidence before a grand jury.

It is essential that *Costello* be carefully analyzed, because one statement from that case has been widely—and improperly—cited to justify the broadside use of illegal evidence before grand juries.[18] *Costello* held that hearsay evidence could be used before a grand jury to support an indictment. However, it is perfectly clear that the Court considered that the inadmissibility of hearsay was merely a "technical rule" of evidence from which grand juries have traditionally been free. The Court stated that,

> " . . . in this country as in England of old the grand jury has convened as a body of laymen, *free from technical rules,* acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." 350 U.S. at 362. (Emphasis added.)

The Court found that to sustain petitioner's contention that hearsay was an inadequate basis for an indictment,

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[18] That statement is:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits." 350 U.S. at 363.

> "would run counter to the whole history of the grand jury institution, *in which laymen conducted their inquiries unfettered by technical rules.*" *Id.*, at 364. (Emphasis added.)

Although it is not unreasonable to conclude that a grand jury can properly proceed "unfettered" or "uninhibited" by formal and technical rules of evidence, it is a totally different matter where the evidence is *illegal*—secured, as here, by the prosecutor in violation of federal law, with the active participation of the grand jury.[19]

Section 605 of the Communications Act of 1934 forbidding wiretapping is, of course, no "technical rule." It prohibits any unauthorized persons "from violating the integrity of a telephone conversation. . . ." *United States v. Tane*, 329 F.2d 848, 852 (2d Cir. 1964). "[E]vidence acquired from a statutory violation [of Section 605] may not be used to obtain a federal conviction." *Id.* In enacting the prohibitions of Section 605, Congress outlawed "resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." *Nardone v. United States*, *supra*, 302 U.S. at 383. See also *Nardone v. United States*, *supra*, 308 U.S. at 340. Moreover, as we have noted, the statutory prohibitions against interceptions of private mes-

[19] Judge Edgerton, in a concurring opinion in *Jones v. United States*, 342 F.2d 863, 872 (D.C. Cir. 1964), placed the statement from *Costello*, noted in fn. 18, *supra*, in its proper—and limited—perspective:

> ". . . We do not understand the Court's opinion to say anything about any other constitutional question. Due deference forbids us to interpret the opinion as containing a vast dictum to the effect that the entire Constitution, including all its Amendments, 'requires nothing more'; in other words, that the proceedings of a legally constituted and unbiased grand jury may violate any number of the defendant's constitutional rights, including his right to the assistance of counsel and his privilege against self-incrimination, without affecting the validity of the indictment. *Costello*, therefore, is no bar to our view that an indictment obtained in violation of constitutional rights must be dismissed. . . ."

sages have now assumed the dimensions of constitutional protections. *Berger v. New York, supra; Katz v. United States, supra.*

Thus, *Costello* properly stands for no broader principle than the authorization for a grand jury to deliberate without the interference of technical evidentiary standards. This is far from justifying the use of illegal evidence which, we believe, should require the dismissal of the indictment.

Such a rule would give proper recognition to the "high place [the grand jury has] held as an instrument of justice." *Costello v. United States, supra,* 350 U.S. at 362. "The basic purpose of the English grand jury was to provide a fair method of instituting criminal proceedings against persons believed to have committed crimes." *Id.* The grand jury,

> "has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated . . . by malice and personal ill will." *Wood v. Georgia,* 370 U.S. 375, 390 (1962).

Indeed, if the appellate holding which sanctions the use of illegal evidence is sustained, the grand jury as a forum for the protection of the defendant will be substantially impaired. That body will be free to secure and act at will upon illegal evidence supplied by prosecutors. Moreover, this standard can promote the procuring of illegal evidence, because prosecutors will be secure in the knowledge that they can use such evidence before a grand jury, although that evidence cannot be introduced at trial. Appropriate exclusionary policies—designed to effect compliance with federal statutes by law enforcement officials—require that illegal evidence not be utilized as the basis of a prosecution—at the indictment *or* the trial stages.

C. *The Court Should Grant Certiorari To Establish a Definitive and Uniform Standard Relating to the Use of Illegal Evidence Before the Grand Jury.*

Further, the Court should consider this important matter on certiorari to meet its supervisory responsibilities. Lower courts—presently struggling with the *Costello* opinion as applied to illegal evidence—have developed a variety of conflicting, inconsistent standards. Thus, there is no even-handed application of a uniform standard in the trial courts; this conflict among the lower courts results in the situation where the presentation of illegal wiretap evidence to the grand jury will, in some courts, result in the dismissal of the indictment; in other courts, the illegal evidence merely will be weighed against the other "competent evidence" which the grand jury considered. This conflict should be resolved.

A review of the opinions of lower courts illustrates this disparity. The court of appeals below applied the *Costello* rule that, even though the prosecutor used illegal evidence to secure the indictment, the indictment was nevertheless valid if "there was ample competent evidence before the grand jury . . . ." 385 F.2d at 291. In *United States v. Tane, supra,* the district court dismissed an indictment based "almost exclusively" upon evidence which had been secured by an illegal wiretap. 329 F.2d at 854. In *United States v. Guglielmo,* 245 F.Supp. 534, 536 (N.D.Ill. 1965), the court dismissed the indictment, holding that "but for" the illegal wiretap evidence presented to the grand jury, there would have been no indictment. It found that the indictment, "tied ineluctably with the illegal wiretapping must be and accordingly [is] hereby dismissed." In *United States v. DiGrazia,* 213 F.Supp. 232 (N.D.Ill. 1963), the court dismissed the indictment as to one defendant although he had made "no direct incriminating statement," *id.* at 234, holding:

> " . . . There is no way to know whether in fact his appearance was incriminating in the minds of some

> or all the members of the Grand Jury. Certainly on the record before me, I cannot say that his testimony might not have tended to incriminate him.
>
> * * *
>
> "Whether constitutional rights have been respected should not be the subject of speculation. Where, as here, there is doubt, the only proper action is to dismiss the indictment."

As to the second defendant in *DiGrazia*, "it [was] conceded that she gave no incriminating testimony before the Grand Jury." *Id.* The Court explained this dismissal of the indictment as follows:

> " . . . there is no way of knowing on what basis the Grand Jury returned the indictment against Rose Calzavara. In fact, absent any record of the proceedings, there is no way to ascertain accurately whether any other evidence at all involving her was presented. But even assuming the presentation of other evidence which, in itself, would have warranted the indictment, it must necessarily be pure speculation as to whether that evidence or the prejudicial conduct of the prosecutor or both prompted the Grand Jury's action." *Id.* at 235.

And, at an earlier stage in this case, the district court dismissed the original perjury indictment, holding that the presentation of illegal wiretap evidence to the Grand Jury required the dismissal of the indictment, *even if additional lawful and competent evidence* had been presented to the Grand Jury which, by itself, might have supported the indictment.[20]

Finally, it should be noted that certain lower courts have held that there is no distinction at all between presenting

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[20] Judge Curran ruled:

> ". . . an indictment based on incompetent evidence, even though returned by a legally constituted and unbiased grand jury, should not be allowed to stand. If this were not so,

illegal and hearsay evidence to a grand jury. *United States v. Birrell*, 242 F.Supp. 191, 205 (S.D.N.Y. 1965); *United States v. Grosso*, 225 F.Supp. 161, 175 (W.D. Penn. 1964); *United States v. Block*, 202 F.Supp. 705, 707 (S.D.N.Y. 1962).

This wide disparity of standards is a telling demonstration that the Court should grant certiorari to establish, once and for all, a clear and simple standard—that *any* use of illegal wiretap evidence before a grand jury vitiates the indictment.

II.

Defendant's Standing To Exclude the Coerced Incriminating Testimony of a Witness

The Court should also grant certiorari to consider whether petitioners had standing to exclude Mrs. Gross' testimony which had initially been "obtained under possible coercive circumstances. . . ." 385 F.2d at 293. Petitioners' assertion was that Mrs. Gross had been coerced before the Grand Jury into testifying against them under threat of prosecution and that threat continued to the time of the trial. To reverse her story would have subjected her to indictment with the other principals, as well as to a perjury charge for presenting a story different than that which was allegedly

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the only reason the trial court could order the disclosure of grand jury proceedings would be where a proper case had been made alleging bias.

* * *

"It is also true that an indictment will not be dismissed if there is some incompetent evidence before the grand jury, as long as there is sufficient competent evidence to sustain it. However, there may be competent evidence and illicit evidence before the grand jury and the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the grand jury did not in fact return the indictment primarily influenced by the illicit evidence. That, the Court considers to be the case here." 226 F.2d at 114.

coerced from her before the Grand Jury. In these circumstances, petitioners moved to present evidence of coercion prior to introduction of her testimony and, on that basis, to exclude that testimony.

The district court and the court of appeals held that petitioners could not object to the introduction of the testimony, even if it was coerced. The court of appeals did not reach the issue of whether, in fact, Mrs. Gross' testimony was coerced. Rather, it assumed that it was; the court held, nevertheless, that petitioners could not move to exclude it, but were left only with discrediting it on cross-examination. 385 F.2d at 291.

This important issue has never been decided by this Court. However, the ruling below is inconsistent with recent Supreme Court decisions justifying the exclusion of evidence secured in violation of a constitutional mandate. Further, in any event, as a matter of due process, coerced testimony should be excluded on the motion of any person implicated by such testimony, because of the basic unreliability of such testimony and because the receipt of this seriously prejudicial and incriminating evidence deprives a defendant of a fair trial.

A. *The Court of Appeals' Reliance Upon a "Personal Rights" Theory of Standing To Exclude Coerced Testimony Is Inconsistent With This Court's Justification of the Exclusionary Rule on the Grounds of Deterrence.*

The lower courts' refusal to consider petitioners' motion that Mrs. Gross' testimony be excluded at trial because it was coerced is based upon a narrow view of those persons who can complain about a violation of a third party's constitutional rights. The court of appeals' reasoning proceeds upon,

> " . . . the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitu-

> tional protection is given.'" *Jones v. United States*, 362 U.S. 257, 261 (1960).

Thus, in *Jones v. United States*, this Court held, as regards standing to challenge illegally seized evidence, that,

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U.S. at 261.

Subsequently, in *Wong Sun v. United States*, 371 U.S. 471, 492 (1963), in a brief comment, this Court held that a defendant could not challenge the introduction of evidence illegally seized from a third party.

Proceeding on this narrow theory, it could be said—as the court of appeals apparently did—that the only person whose rights were violated when Mrs. Gross was coerced to confess was Mrs. Gross herself. If she did not complain, no one could.

This stringent reading of the requisites of standing to challenge evidence illegally secured cannot be squared with more recent Supreme Court decisions explaining the Exclusionary Rule. Thus, in *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), the Court "abandoned the personal incrimination theory and accepted a general deterrence rationale, pointing out that the real persons the exclusionary rule seeks to protect are the unknown potential victims of unreasonable police conduct."[21] There, the Court concluded that:

> " . . . 'in rejecting the Wolf doctrine as to the exclusionary rule [that the rule does not apply to the states] the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. . . .'" 381 U.S. at 637.

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[21] Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342, 352-53 (1967).

Subsequently, in *Tehan v. United States ex rel Shott*, 382 U.S. 406, 413 (1966), dealing with self-incrimination, deterrence of illegal conduct was characterized as the "single and distinct" purpose of the Exclusionary Rule.

These later cases require, we believe, a full-scale reassessment of those persons who have standing to challenge illegal evidence.[22]

The Exclusionary Rule, based on the rationale of deterrence, has recently been characterized as follows:

> "The underlying assumption of the rule is that the incentive for conducting illegal searches and seizures will be largely destroyed if prosecutors are barred from using the fruit in a criminal prosecution. And it is argued that if the incentive is reduced, the police will have less reason to violate the individual's right of privacy." *United States ex rel De Forte v. Mancusi*, 379 F.2d 897, 904 (2d Cir. 1967).

We believe that the same rule must apply to confessions and testimony which are the product of coercion by the police or prosecution. As the Supreme Court said in *Spano v. New York*, 360 U.S. 315, 320-21 (1959):

> "The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

To deter, to remove the incentive to coerce confessions, the prosecution should have no right, at any place and in

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[22] "*Linkletter* and its progeny add up to the conclusion that the Court is now operating under a general deterrence theory of the exclusionary rule. Since the *Jones - Wong Sun* standing doctrine has never been examined under this theory, a reappraisal of its current validity is in order." Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342, 356 (1967).

any forum, to exploit them.[23] This rule has long been accepted in California, where Mr. Chief Justice Traynor has written:

> " . . . 'Since all the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights.'" *People v. Martin*, 45 Cal.2d 755, 761, 290 P.2d 855, 857 (1955).

Moreover, a recent decision of the California Supreme Court has applied that rule to instances where a witness' testimony is coerced. In *People v. Varnum*, 427 P.2d 772, 775-76 (1967), the California Supreme Court "decided a defendant could . . . assert the due process rights of another suspect who is himself never prosecuted."[24] We believe that the standing rule as developed in California most clearly comports with appropriate federal standards.

In light of the *Linkletter* and *Tehan* decisions of this Court, *supra*, and the conflicting constitutional principles advanced in *Martin* and *Varnum*, we believe that the Court should grant certiorari to determine whether those decisions require the rejection of a standing theory based on the obsolete "personal rights" concept and its replacement with a rule of standing providing the broadest impact for the ex-

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[23] *Cf., Comment, Developments in the Law - Confessions*, 79 Harv. L. Rev. 938, 969 (1966):

> "The Court has been seen as treating 'outrageous' or 'illegal' conduct during interrogation as the unconstitutional primary activity of the police; the exclusionary rule for confessions, like that in the search and seizure cases, is thought to provide an effective remedy to victims of improper conduct and to deter improper interrogations by removing any incentive to engage in them."

[24] Note, 81 Harv. L. Rev. 707, 711 (1968).

clusionary rules—to deter illegal prosecutional and police practices.

B. *Coerced Testimony Should Be Excluded Upon Challenge by Any Person Incriminated by Such Testimony Because of the Basic Unreliability of the Testimony*

Even if this Court adheres to the ruling in *Jones* and *Wong Sun* denying a defendant's standing to challenge illegally seized evidence from a third person, a different rule should prevail in the case of coerced testimony.

Beyond any dispute, illegally seized evidence is itself reliable and intrinsically competent evidence; it is excluded to require adherence to the constitutional mandate. In contrast, however, coerced confessions or coerced testimony are essentially unreliable. Since they are the product of duress, one cannot rely upon their veracity. This very fact of their unreliability is a major reason why coerced confessions have been excluded. See *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *Stein v. New York*, 346 U.S. 156, 192 (1953); *Watts v. Indiana*, 338 U.S. 49, 57, 59-60 (1949) (concurring opinion); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944); *Chambers v. Florida*, 309 U.S. 227, 240 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936).

Any person implicated by coerced testimony should have, as a matter of due process, the right to challenge essentially unreliable testimony. To the degree that due process requires that coerced *confessions* be excluded because of their unreliability, it is indefensible to fashion a rule which would admit coerced *testimony* from witnesses, which is even less reliable. Likewise, to the degree that coerced confessions are excluded "to prevent fundamental unfairness in the use of evidence, whether true or false,"[25] there is no justification for distinguishing between coerced confessions and coerced testimony. The use of improper physical or psychological force against a *witness* is just as incon-

[25] *Lisenba v. California*, 314 U.S. 219, 236 (1941).

sistent with the standards of our accusatorial system of criminal law as is its use against a *defendant. Cf. Rogers v. Richmond,* 365 U.S. 534, 540-41 (1961). "It is difficult to see how a fair trial can be maintained when the most damaging testimony against the defendant consists of something the witness might never have said, but for the pressure applied to him."[26]

Indeed, coerced testimony incriminating a third party is even more unreliable than a coerced confession. A confession will implicate the speaker. How much easier it is for a speaker, under coercion, to implicate a third party. Thus, to the degree that coerced confessions are excluded because of their unreliability and to insure a fair trial, so must be coerced testimony secured under the same circumstances implicating a third party.

The lower court's suggestion that any prejudice can be vitiated by the defendant's cross-examining the coerced testimony is clearly insufficient. In the parallel coerced-confession situation, such unreliable evidence is excluded entirely.

The inadequacies of relying upon cross-examination to cure the defect is aptly demonstrated here. The court below *assumed* that Mrs. Gross' testimony before the Grand Jury implicating petitioners was coerced. Mrs. Gross thereafter testified in a fashion consistent with her coerced testimony before the Grand Jury. At trial, it is perfectly clear that Mrs. Gross was in the position of being forced to persist in her earlier story, whether it was true or not, because to testify otherwise would risk a perjury conviction and subject herself to the possibility of being joined in the indictment which was the basis for the assumed coercion in the first place. Obviously, in the face of these circumstances, granting the defendant the opportunity to cross-

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[26] *Comment, The Right of a Criminal Defendant to Object to the Use of Testimony Coerced from a Witness,* 57 Nw.U.L. Rev. 549, 555 (1962).

examine Mrs. Gross simply cannot provide adequate redress for the essential unreliability and unworthiness of her testimony. This testimony should be excluded outright.

This serious constitutional issue has been recognized in *Turner v. Pennsylvania*, 338 U.S. 62, 65-66 (1949). The opinion of Mr. Justice Frankfurter referred to the question of "exclusion of statements by co-principals not on trial." He noted that, "Assuming . . . that as a matter of local law these statements are admissible, there would then arise the question whether under the Fourteenth Amendment a coerced statement may be excluded on objection of one not coerced into making it." And, in *United States v. Wolfe*, 307 F.2d 798, 801 (7th Cir. 1962), the court of appeals stated:

> "We are not unmindful that a case might well arise where the procurement of evidence to be used in a federal prosecution might have been obtained by proved coercion violative of the constitutional rights of a *witness* and that a serious question might arise in that event upon the use of such evidence upon the trial of *defendant*."

This petition squarely prevents this "serious question" of constitutional law. It has never been squarely considered by the Court. Certiorari should be granted to resolve it.[27]

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[27]It is appropriate that this question be resolved initially in a case coming from the federal courts rather than a state case. *Cf. People v. Portelli*, 15 N.Y.2d 235, 205 N.E.2d 857 (N.Y.Ct.App. 1965), *cert. denied*, 382 U.S. 1009 (1966). That case was a direct appeal from a state court; federal habeas corpus was available there to litigate these issues, with later review by the Supreme Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES F. FITZPATRICK
1229 Nineteenth Street, N.W.
Washington, D. C.

RALPH J. TEMPLE
Suite 501
1424 Sixteenth Street, N. W.
Washington, D. C.

Attorneys for Petitioner

Of Counsel:

WM. WARFIELD ROSS
National Capital Area Civil Liberties Defense and Education Fund

LAWRENCE SPEISER
MELVIN L. WULF
American Civil Liberties Union

February 5, 1968

APPENDIX A - Opinions Below

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,562

JAMES J. LAUGHLIN,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

No. 19,563

ALLAN U. FORTE,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided July 28, 1967

Mr. James J. Laughlin, pro se.

Mr. William J. Garber, for appellant Forte.

Mr. James A. Strazzella, Assistant United States Attorney, with whom *Messrs. David G. Bress,* United States Attorney, and *Frank Q. Nebeker,* Assistant United States Attorney, were on the brief, for appellee.

Before MILLER, *Senior Circuit Judge,* LEVENTHAL, *Circuit Judge,* and COFFIN*, *Circuit Judge* of the United States Court of Appeals for the First Circuit.

COFFIN, *Circuit Judge:* The appellants, Laughlin and Forte, challenge on numerous grounds their conviction for conspiracy to obstruct justice and endeavoring to influence a witness. To understand clearly all the points raised, it is necessary to review the complex history of this and related cases from September 11, 1961, when Forte was indicted in the District of Columbia for abortion, alleged to have been committed on Mrs. Jean Smith, of Baltimore, Maryland. Laughlin was Forte's counsel at the trial, which began on February 12, 1963. Two other characters who will assume importance in this narrative are Detective Sergeant Samuel Wallace of the Washington police, who arrested Forte on the abortion charge, and Mrs. Bernice Gross, who investigated the charge while a member of the Baltimore police. The prosecution's principal witness at trial was Mrs. Smith. In defense, Forte testified that the charge was a fabrication, part of a "shakedown" scheme engineered by Sgt. Wallace. The trial ended on February 20 in a verdict of acquittal, but Forte's accusation triggered a grand jury investigation into "all the evidence of any obstruction of justice" in the case.

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* Sitting by designation pursuant to Section 291(a) Title 28 U.S. Code.

Before the grand jury, the evidence soon drifted away from the accusation directed at Sgt. Wallace. Mrs. Gross, testifying first, disclaimed any knowledge of a shakedown involving Wallace, and repeatedly denied speaking to Forte concerning his accusation or receiving payment from either Wallace or Forte or anyone acting for them in return for services performed in the Smith abortion case. Then Mrs. Smith testified that Mrs. Gross had sought to persuade her not to testify in the abortion case; that, at Mrs. Gross's instruction, she had written to the the United States Attorney asking to be excused as a witness; and that after writing the letter she had received several "presents" of money and baby clothes from Mrs. Gross.

Thereafter Mrs. Gross was taken to the office of Assistant United States Attorney Joseph M. Hannon, told of the facts that the government had learned from Mrs. Smith, and warned that she might be prosecuted for perjury unless she told "the truth about what happened." The Assistant United States Attorney in charge of the grand jury proceeding, Harold J. Sullivan, promised that he would ask the grand jury to be lenient in considering Mrs. Gross's part in dealing with Mrs. Smith, if it appeared that Mrs. Gross would be a witness against Laughlin and Forte. During approximately two hours of questioning, she admitted the truth of Mrs. Smith's story and stated in detail that she had acted at the direction of Forte and Laughlin. Then she returned to the grand jury proceedings and affirmed the statement she had given during the interrogation. At the close of her testimony, Mr. Sullivan asked if she would make telephone calls to Forte and Laughlin and allow the government to record the conversations. She demurred at first, then acquiesced when the deputy foreman suggested that, although the jury would prefer to "get the ones responsible for the overall operation", "if they make it impossible for us to get the big ones we'll get the little ones." The calls were made

and recorded. Later, after Laughlin testified before the grand jury that he had never met or spoken to Mrs. Gross, the government played for that jury a recording of at least one conversation between Mrs. Gross and Laughlin in which Laughlin's comments appeared to assume prior acquaintance with Mrs. Gross and familiarity with the dealings with Mrs. Smith.

In July 1963 the grand jury issued two indictments that are relevant here. One charged Laughlin with perjury in his testimony before the grand jury. The other, which gave rise to the present case, was in four counts. The first charged Laughlin and Forte together with conspiring to obstruct justice and commit offenses against the United States by, *inter alia*, influencing a material witness (Mrs. Smith) in the abortion trial. 18 U.S.C. § 371. Count two charged Forte individually and count four charged Laughlin individually with attempting to influence Mrs. Smith. 18 U.S.C. § 1503. And count three, which was later dismissed, charged Forte with endeavoring to influence another witness (Mrs. Dorothy Birge).

The perjury trial began first, on October 1, 1963. The government offered as evidence recordings of the Gross-Laughlin telephone conversations. The trial court at first found that Mrs. Gross had consented to the recordings and admitted them into evidence; then, after reviewing the transcript of the colloquy at the close of Mrs. Gross's grand jury testimony, ruled the recordings inadmissible on the ground that Mrs. Gross's consent was coerced. A mistrial was declared. *United States* v. *Laughlin*, 222 F.Supp. 264 (D.D.C. 1963). Laughlin filed a motion to dismiss the indictment, which was granted on the ground that without the excluded recordings the prosecution rested solely on the uncorroborated testimony of Mrs. Gross. *United States* v. *Laughlin*, 223 F. Supp. 623 (D.D.C. 1963).[1] The government moved to reconsider and

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[1] At the same time the District Court denied a motion to

vacate the order of dismissal, arguing that Mrs. Gross's testimony was corroborated by telephone company records of calls between her number and Laughlin's. The motion was denied, *United States* v. *Laughlin,* 226 F. Supp. 112 (D.D.C. 1964), for reasons that will be discussed below. The government noted an appeal, then voluntarily dismissed it, and the perjury case terminated.

Trial began on the conspiracy indictment on April 16, 1964, resulting in judgments of conviction. Among the government's evidence were the telephone recordings that had been ruled inadmissible at the perjury trial. We reversed the conviction of both defendants and remanded for a new trial, holding that the judgment in the perjury case precluded relitigation of the admissibility of the recordings. *Laughlin* v. *United States,* 120 U.S. App. D.C. 93, 344 F.2d 187 (1965).

The new trial began on June 2, 1965. The government's case consisted basically of the testimony of Mrs. Smith and Mrs. Gross, which was generally consistent with their testimony before the grand jury. Mrs. Gross also testified to a considerable number of telephone conversations with either Forte or Laughlin in which the details and the progress of the conspiracy were discussed. On this point her testimony was corroborated by telephone company records, many of them the same records involved in the motion to reconsider dismissal of the perjury indictment, *supra.*

In defense, Forte testified that Mrs. Gross had instigated their meetings, offering to help him in the Smith case; that, upon his response that he wasn't worried about the Smith case because he was innocent but was disturbed by Sgt. Wallace's shakedown attempts, she offered to "take care of that"; and that he paid her for attempting to take care of Wallace. He denied any part in attempt-

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dismiss the pending conspiracy indictment. 223 F.Supp. at 626.

ing to influence Mrs. Smith. Laughlin offered no testimony. The jury returned a verdict of guilty on all three counts.

Both defendants now appeal, raising points that appear to make all the above facts and proceedings relevant to some degree. Upon consideration of all the points raised, we find no error in this latest trial. Of some seventeen separately entitled points in appellants' argument, we have selected only those which, in our view, merit considered discussion here.

Appellants argue that the indictment should have been dismissed because of a variety of defects in the grand jury proceedings. Most substantial of these is the claim that the recordings of the Gross-Laughlin telephone conversations, now established to have been illegally obtained, were played for the grand jury and thus contributed to and tainted the indictment. As to this, the Supreme Court has repeatedly held that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial on the merits." *Costello* v. *United States,* 350 U.S. 359, 363 (1956). It might, we suppose, be argued that *Costello* involved only the use of hearsay evidence before the grand jury, while this case involves the use of evidence obtained in violation of law, and that the deterrent policy of the exclusionary rule (*e.g., Mapp* v. *Ohio,* 367 U.S. 643 (1961)) requires us to deny the government any benefit from an invasion of personal rights. *But see Holt* v. *United States,* 218 U.S. 245 (1910) (coerced confession).[2] But the defendant had ample opportunity at trial to prevent any ultimate prejudice stemming from the government's illegal actions. We do not mean to say that an indictment would always be unassailable, even when

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[2] *See also Developments in the Law—Confessions,* 79 Harv. L. Rev. 935, 1055-57 (1966).

based on no competent evidence. *Cf. United States* v. *Laughlin, supra,* 226 F. Supp. at 114. Here there was ample competent evidence before the grand jury to justify bringing the defendants to trial on the conspiracy charge. *Cf. Coppedge* v. *United States,* 114 U.S. App. D.C. 79, 311 F.2d 128 (1962), *cert. denied,* 373 U.S. 946 (1963). Nor can we say as a matter of law that the recordings might have had such force in establishing the conspiracy charge (as opposed to the perjury charge against Laughlin) that their admission tainted the entire proceedings.

It is argued further that the grand jury exhibited bias against both Forte and Laughlin. Most of the instances cited reflect only a natural reaction to the evidence that Forte and Laughlin had engaged in a criminal conspiracy and show, not that the jury was biased, but that it believed the evidence. One noteworthy incident occurred during Sgt. Wallace's testimony. Mr. Sullivan asked:

> "And as a result of certain information which came to the attention of the United States Attorney from Mr. James J. Laughlin, did there come a time in the past several days that you checked out a story provided us by Mr. Laughlin that Jean Smith of the Baltimore area had a record or a reputation as a call-girl and prostitute?"

Wallace answered that his investigation showed only that a Jean Smith had once been arrested in Baltimore County for being drunk and disorderly. This prompted a juror to remark that "Mr. Laughlin seems to be throwing around an awful lot of accusations." And, very shortly, a juror (perhaps the same one) said:

> "We had this charge interjected into this case against this Hill woman, the same charge . . . . And I think in the future, on these witnesses we have had an awful lot of countercharges here, and a lot of people make countercharges when they are trying to cover up something against themselves. . . . I think this Grand Jury wants to hold this testimony on a little

higher standards than Jim Laughlin's concept of trying a law case. That's all I have to say."

Although the record before us does not reveal the precise source of the other accusations that went to make up the "awful lot", we note that this one appears to have been injected gratuitously by Mr. Sullivan in a way that could have prejudiced Laughlin unfairly. That Laughlin made such an accusation, if in fact he did, would be relevant only on the tenuous theory that he thereby acted as a guilty man would. Such evidence would surely be inadmissible at trial, even if presented, as here it was not, by direct testimony rather than unsworn hearsay. Moreover, we are at least surprised that Wallace, who was himself an object of the grand jury's investigation, should be used as an investigator. The effect may well have been equivalent to an endorsement of his trustworthiness by the United States Attorney's office.

Nevertheless, although we may condemn this incident as bad practice in the abstract, we are not persuaded that the defendants were substantially prejudiced by it. The other competent evidence before the grand jury was ample to support the indictment; and in no way does this incident or any other incident in the record demonstrate the sort of general bias against the accused that would vitiate the proceeding and require dismissal of the indictment.

Coming to the trial itself, appellants' principal contention is that Mrs. Gross's testimony should have been excluded entirely, on two grounds: (a) that the statements of a coconspirator are inadmissible against anyone but himself unless there is substantial independent evidence tending to establish the existence of the conspiracy; and (b) that the testimony here was coerced and inherently incredible as a matter of law.

The first argument is based on a misunderstanding of the rule of law cited. That rule applies only to out-of-court (*i.e.*, hearsay) statements of a coconspirator. *E.g.*,

Glasser v. *United States,* 315 U.S. 60 (1942). It does not exclude proof of a conspiracy by the direct testimony under oath of a party to it.

The second argument rests on what is asserted to be the coercive nature of the United States Attorney's interrogation of Mrs. Gross during the grand jury proceedings, on the established coercion in obtaining her permission to record telephone calls, and on allegations of her dealings with the United States Attorney that are wholly unsupported by the record. But we are not dealing here with the admissibility of an allegedly coerced confession against Mrs. Gross herself. Nor are we dealing with the use of such a statement against someone else. *Cf. Turner* v. *Pennsylvania,* 338 U.S. 62, 65-66 (1949) (dictum). Here Mrs. Gross testified directly in open court. That the substance of her testimony coincided with prior statements obtained under possible coercive circumstances is of no consequence, except perhaps as the jury might have considered it to bear on her credibility. As to that, the appellants were afforded and they exercised full opportunity on cross-examination to bring out, not only the circumstances of Mrs. Gross's prior statements to the United States Attorneys, but also her prior perjury before the grand jury and her hope of escaping indictment for her own part in the conspiracy.

Appellant Laughlin contends that the telephone company record cards, purporting to show calls between Mrs. Gross's telephone in Baltimore and various of Laughlin's telephones in Washington, should have been excluded from evidence because the same records were conclusively ruled inadmissible on the government's motion to vacate dismissal of the earlier perjury indictment. *United States* v. *Laughlin,* 226 F. Supp. 112 (D.D.C. 1964), *supra.* But we do not read the decision in that proceeding as declaring the records inadmissible. The question before the district court was whether, when the illegally obtained tape

recordings were excluded, the competent evidence before the grand jury was sufficient to support an indictment for perjury in view of the rule that perjury must be proved by at least the testimony of one witness plus convincing corroboration. 226 F. Supp. at 114. Thus, the court held only that the telephone record cards did not constitute convincing corroboration. But that is not to say that they do not constitute permissible corroboration in a non-perjury case. In fact, the reason for the district court's decision is that:

> "These records prove only one thing, if they prove anything at all, and that is, telephone calls were made between certain telephone numbers. To argue from a phone company record showing a call between certain phone numbers that the persons in whose names those phones are listed made the call is destructive of a very important rule of evidence; namely, that the person making the entry . . . should be making the entry based on personal knowledge. . . ." 226 F. Supp. at 113.

Here, before the cards were offered in evidence, Mrs. Gross testified that she had made or received calls to or from Laughlin at the days and times shown on the cards. It was permissible to show in corroboration that calls were in fact made between the relevant telephone numbers on those days at those times, and the cards were offered for no other purpose. There is no requirement in this case that the corroboration be convincing.

On cross-examination of appellant Forte, the government was allowed to ask: ". . . are you the same Allen U. Forte who, in March of 1942, under the name of A. U. Forte, in North Carolina, was convicted of abortion?" And Forte replied: "Yes, I was, but I was later pardoned by the Governor." Forte now argues that the trial court abused its discretion under the doctrine of *Luck* v. *United States,* 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), in allowing the impeachment. On the contrary, the record shows that the trial court observed carefully the spirit of

Luck in deciding to allow the question, while excluding mention of several later convictions in Maryland. The issue was heard out of the presence of the jury for nearly a day and a half of the trial. The certificate of pardon in no way indicated that it was grounded on Forte's innocence. On redirect examination Forte testified in explanation that he had pleaded *nolo contendere* to the charge because of a misunderstanding. Furthermore, despite the trial court's specific permission to protest his innocence, *see United States* v. *Boyer*, 80 U.S. App. D.C. 202, 150 F.2d 595 (1945), Forte did not do so.

Nor was there error in refusing a requested instruction that Forte's explanation and the pardon could be considered in evaluating his criminal record. The request was tendered after the entire charge had been given, long after Forte's counsel had specifically conceded that the court's instruction on the effect of the conviction was correct if the evidence of the conviction was properly admitted. Under the circumstances the court was well justified in refusing to argue the defendant's case.

Similarly, there was no error in refusing the immediately following request "that the jury be instructed, as Forte testified, his relation with Gross was instigated by Gross, and the purpose of their meeting and telephone conversations was for Gross to supply Forte with information concering one Samuel Wallace."[3] The trial court is not required to rehearse the evidence, especially where the effect would be, as it would here, to give special emphasis to the defendant's testimony. This is not a case like *Levine*

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[3] We take it that the trial court interpreted this as a request that the jury be instructed to acquit Forte if they believed his testimony and not, as the language quoted seems to say, a request that Forte's testimony be declared true. After the request was denied, Forte's counsel submitted a written version for the record which cleared up the ambiguity, but otherwise added nothing significant.

v. *United States,* 104 U.S. App. D.C. 281, 261 F.2d 747 (1958),[4] where there was a risk that the jury might find the defendant guilty although believing his testimony, because of failure to appreciate the significance of defendant's evidentiary theory.

In defining the government's burden to prove guilt beyond a reasonable doubt, the trial court said:

> ". . . A reasonable doubt is one which is reasonable in view of all the evidence. Therefore, if after an impartial comparison and consideration of all the evidence you can candidly say that you have such a doubt as would cause you to hesitate to act in matters of importance to yourselves, then you have a reasonable doubt. But if after such impartial comparison and consideration of all the evidence, and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt."[5]

Appellants assert that it was error not to add that reason-

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[4] In *Levine,* the defendant, a lawyer, was charged with falsely impersonating a police officer in attempting to obtain a statement from the prosecuting witness in a criminal case in which he represented the defendant. He testified that he had said that he was an attorney for the defense and that he was an "officer of the Court and that it was my duty to find out what happened so that I could protect my client." 104 U.S. App. D.C. at 282, 261 F.2d at 748. In a sense these "special facts" constituted a sort of confession and avoidance which, though sounding like "impersonating a police officer", would, if believed, absolve the defendant. This is quite different from a "theory" that the conversations were innocent rather than conspiratorial.

[5] We note that this charge is virtually identical in substance with the "exemplary" charge in *Moore* v. *United States,* 120 U.S. App. D.C. 203, 345 F.2d 97 (1965).

able doubt might arise from lack of evidence. To be sure, we have on occasion defined reasonable doubt as "a doubt arising from the evidence or from a lack of evidence, after consideration of all the evidence." *E.g., Bishop* v. *United States,* 71 U.S. App. D.C. 132, 107 F.2d 297 (1939). But we did not thereby make our language the only correct formula. In fact, in a case where some lack of evidence for the government fairly creates a reasonable doubt of guilt, we may expect a normally intelligent jury to perceive that fact after comparison and consideration of all the evidence. *See People* v. *Radcliffe,* 232 N.Y. 249, 133 N.E. 577 (1921). But we need not declare that in all cases it would be correct to refuse a tendered instruction like the appellants' here. For here the appellants have made no attempt to show prejudice, and after reading the entire trial transcript we can see none.

Finally, appellants argue that they were gravely prejudiced by the trial court's reading to the jury paragraph six of count one of the indictment. That paragraph alleged that one of the objects of the defendants' conspiracy was to influence Mrs. Dorothy Birge, a material witness in the abortion trial. Count three, charging Forte with endeavoring to influence Mrs. Birge, had been dismissed before trial for failure to allege venue in the District of Columbia; but that did not make it improper to allege the same endeavor as part of the conspiracy. The jury was properly instructed that the indictment was not evidence. Moreover, when the court offered to clarify the significance of paragraph six, both appellants declined on the ground that it might "compound the effect that the reading of this might have". Even if paragraph six had not been a proper part of the indictment, we think an explanation and instruction to disregard would have been effective. This is not a case where inherently persuasive evidence was improperly admitted.

We have considered carefully all the other points raised

by appellants in their brief and memoranda allowed to be filed after argument and find them wholly without merit. We are satisfied from our reading of the entire record that the trial was conducted in an exemplary manner, with notable concern to protect the appellants' rights.

Affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,327

JAMES J. LAUGHLIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

JUL 28 1967

Decided July 24, 1967

Mr. James J. Laughlin, appellant *pro se.*

Mr. James A. Strazzella, Assistant United States Attorney, with whom *Messrs. David G. Bress,* United States Attorney, and *Frank Q. Nebeker* and *Harold J. Sullivan,* Assistant United States Attorneys, were on the brief, for appellee.

Before WRIGHT, MCGOWAN and LEVENTHAL, *Circuit Judges.*

PER CURIAM: Appellant was convicted of perjury, 18 U.S.C. § 1621, and sentenced to 20 months to five years, to run concurrently with two other concurrent 20 month to five years sentences imposed in a companion case, *Laughlin*

v. *United States*, No. 19,562, affirmed today. We have carefully studied the various points raised on this appeal. We find them all without merit.

Affirmed.

APPENDIX B - Judgments Below

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit
September Term, 1966

James J. Laughlin, Appellant,	)	
v.	)	No. 19,562
United States of America, Appellee.	)	
Allan U. Forte, Appellant,	)	
v.	)	No. 19,563
United States of America, Appellee.	)	

Appeals from the United States District Court for the District of Columbia

Before: Miller, *Senior Circuit Judge*, Leventhal, *Circuit Judge*, and Coffin,* *Circuit Judge* of the United States Court of Appeals for the First Circuit.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgments of the District Court appealed from in these causes be, and they are hereby, affirmed.

Per Curiam

Dated: July 28, 1967

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* Sitting by designation pursuant to Section 291(a) Title 28 U.S. Code.

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

James J. Laughlin, Appellant, v. United States of America, Appellee.	)	No. 20,327

Appeal from the United States District Court for the District of Columbia

Before: Wright, McGowan and Leventhal, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam

Dated: July 28, 1967

APPENDIX C

PROCEEDINGS BEFORE GRAND JURY AND INTERROGATION BY PROSECUTION TENDING TO SHOW COERCION OF MRS. GROSS

United States v. In Re: Pos. Viol. of 22 D.D.C.U.S.C. 501, et al., January 1963 Grand Jury, March 1, 1963, Friday.

Mrs. Gross first appeared before the Grand Jury on March 1, 1963. In this appearance, Mrs. Gross denied any knowledge of or any connection with petitioners or any attempt to influence witnesses in the Forte abortion trial. The transcript of that session, and later sessions, of the Grand Jury is included in the certified record here.

Thereafter, Mrs. Gross was taken to the office of the prosecutor where she was interrogated by two prosecuting attorneys. She was confronted with the conflicting testimony of Mrs. Smith, the person upon whom Forte allegedly had performed the abortion. The following excerpts tend to indicate a course of coercion and duress pursuant to which Mrs. Gross changed her story and implicated petitioners.

1. Excerpts from "Interrogation of Mrs. Bernice Gross, Room No. 3439, U.S. Attorney's Office U.S. Court House, Washington, D.C., Friday, 1 March 1963, from 12:17 to 2:30 p.m."

[Prosecutor A]: Mrs. Gross, I have asked the reporter to stay. I want to say the same things I said in the Grand Jury to you again. We want your cooperation from you very much, but first of all, just like I did in the Grand Jury, you have a perfect right under the Fifth Amendment to say I don't want to say anything. It is a perfect right you have. No one can hold it against you, even if it is a question that leads up logically to another one that is going to get you in trouble. [p.1]

Mrs. Gross: I don't want that. I had that once. I told you.

* * *

[Prosecutor A]: Let me tell you what we are going to talk about.. Just remember that before you start saying a
[p.2] single word if you want to call an attorney you can use the phone here, use the pay phone, you can leave and talk to an attorney, and come back. You are under no compulsion to stay, but we want to ask your help on something. So you do understand all that?

Mrs. Gross: I understand, but what do I need an attorney for?

* * *

[Prosecutor A]: Your answers then in the Grand Jury are just absolutely clear, there is no doubt about what you said. You said in there you understood what we were investigating and you knew it was an investigation to get truthful answers. That is all we want to do.

[p.3] Mrs. Gross: Well, that is not true. I'll tell you the same thing I did the Grand Jury. I don't know anything, and that is it. Not a thing.

[Prosecutor A]: Well, here's the thing, Mrs. Gross. We want your cooperation. I'm not saying you're not being truthful about that now but I'm saying we are sure of certain things. We are sure of that call of Forte's lawyer after the trial when he said he was dissatisfied.

Mrs. Gross: No, that isn't true; that isn't true.

[Prosecutor A]: Someone said he was Forte's lawyer, someone you thought was?

Mrs. Gross: No; no.

[Prosecutor A]: You don't have to say anything about it at all, not a single word, but here's the proposition I want to make to you. We want your truthful testimony, we want it very badly because we want to know who is putting up the money in this case to get witnesses to skip out on the trial or to come to the trial and lie. We want to know that very, very badly, and we know certain approaches–

* * *

[Prosecutor A]: I'll say this to you. When I talked on the phone last night, and Mrs. Gross and I talked earlier in the case, it has been such a pleasant relation that I feel bad because I have evidence that you are not telling the truth. I feel bad for you because there are things, and the answers you just gave in the Grand Jury there were clear answers, they were understandable answers, no equivocation. You said you realized the questions were material. You said you understood you had a right under the Fifth Amendment– [p.4]

Mrs. Gross: Yes, but–

[Prosecutor A]: You said you wanted to testify. You did testify and the Grand Jury is in position to be able to deliberate as to whether you committed perjury. I want you to know perjury over here carries a two-year minimum jail sentence and a maximum of ten. There is no sense of you getting caught in a bind if you can put the finger on who put this money up. Now we have evidence and it is a simple thing. It is tough for someone to spin somebody who has been given money. It's tough. But don't get caught in a bind yourself.

* * *

Mrs. Gross: What is it that you want out of me, and what will happen to me? [p.5]

[Prosecutor B]: The truth.

Mrs. Gross: I know, but I told the truth once before, too. I mean if you can't understand my position.

[Prosecutor A]: I think I do.

* * *

[Prosecutor B]: What [Prosecutor A] is suggesting is that you're in the switches again. [p.6]

Mrs. Gross: I know, and I'm wondering what's going to happen to me.

[Prosecutor A]: Here's what can happen. If you just simply tell the truth to the Grand Jury about who gave you the money, how much they gave and what they wanted

you to get Jean Smith to do, I will tell the Grand Jury that our position is that a wrong has been committed, somebody tried to get a witness taken care of, a lot of money was spent on it, and without your testimony the whole thing falls apart.

Mrs. Gross: Then what will happen?

[Prosecutor A]: Here's what will happen. I will say to that Grand Jury the U.S. Attorney's Office considers this to be about the dirtiest thing that has happened in a long time in a trial over here, there's been money passed out in the Jean Smith trial, Birge—

Mrs. Gross: I don't know about it. I never met her. I don't know anything.

[p.7] [Prosecutor A]: If you tell the truth about what happened in the Smith thing—I'm the DA that will be handling the Grand Jury; [Prosecutor B] came in on it—and I will say to the Grand Jury alone, or I'll say it with you present, I'll ask the Grand Jury to consider this fact: It is an important case where these people tried to get witnesses paid off, there's a lot of money being spent; justice can't work out if people are paying money like that; everything fails if the oath fails; but, Grand Jury, there is one thing you have got to do, give us this witness for trial; we need Mrs. Gross; without her we have got nothing, with her we have got something; indict the big fish and let Mrs. Gross be a government witness; without her we have got nothing.

Mrs. Gross: In other words, if Jean Smith had gotten any money would she have testified? If she had gotten anything would she have testified the way she did? Truthfully?

[Prosecutor A]: She did. Mrs. Smith got several sums of money; later came over here to Washington trying to get out of the case. The specific suggestion was made to her, say your baby is sick tomorrow and you don't have to go. What will I do next time, Mrs. Gross? Next time say you are sick. This thing will be taken care of, it will never go

to trial. You say when you get on the stand, Mrs. Smith, you don't recognize Forte. I'm not going to lie, but these letters are written, the gifts of money are made. [p.8]

* * *

[Prosecutor A]: We don't want you mixed up, all we want is the simple unvarnished truth.

Mrs. Gross: Am I on trial or what?

[Prosecutor A]: That is your choice.

[Prosecutor B]: [Prosecutor A] has indicated it is your choice. If you want to talk to a lawyer you are free to talk to the lawyer. I think that in your experience—you're an [p.9] experienced policewoman, aren't you? I would say you're in the switches.

* * *

[Prosecutor A]: I want to level with you. If you tell the truth about what happened you're not going to get in trouble because I'm going to tell the Grand Jury without you there is no chance of our making the case on the big fish; there is no possibility—there is a very small possibility, but without you we can't do it.

* * *

[Prosecutor A]: Until I know you're on the right team—[p.10]

Mrs. Gross: I don't want to be on the wrong team, believe me I don't. I was never involved criminally in anything, never, and I don't intend to start now, believe me.

[Prosecutor A]: As [Prosecutor B] said, you're in the switches. You have got a decision right now which way you are going to go. If you want to be on the right team, the one telling the truth, that is what we want from you, whatever is the truth.

Mrs. Gross: What will happen if I just don't know anything about it? Nothing?

[Prosecutor A]: Well, the possibilities of what can happen are these: You told a story in the Grand Jury this morning.

Mrs. Gross: That's right.

[Prosecutor A]: If it is a lie, and we have one witness, that is not a perjury. We have one witness who says it was different and we have other evidence. I'll tell you what we will do. I'll be frank with you.

Mrs. Gross: I want you to.

[Prosecutor A]: We have something. I'm not going to tell you if you decide to go back to Laughlin and that crowd.

* * *

[p.12] Mrs. Gross: This deal—you didn't answer my question: What is going to happen to Bernice?

[Prosecutor A]: If you tell the truth you are going to be a government witness."

* * *

[p.13] [Prosecutor B]: And possibly, as [Prosecutor A] said, if, for example, you testified before the Grand Jury and lied to that Grand Jury, it might be if it saw fit that the Grand Jury could indict you for perjury.

Mrs. Gross: Then it's all against me, too, then even now?

[Prosecutor B]: That's the way the picture is right now.

Mrs. Gross: Even if I levelled with you all it would still be the same?

[Prosecutor A]: No, it wouldn't.

[Prosecutor B]: [Prosecutor A] has indicated —

[Prosecutor A]: I'm putting this on the record.

Mrs. Gross: So I see.

[Prosecutor A]: But this is a protection to you too. We need your testimony about the woman. However fine a woman you may be you are small change in this obstruction of justice. You are not the king pin. The king pin has been getting away with something for a long time."

* * *

[Prosecutor A]: * * * All we have is my word that I will ask the Grand Jury to give us a witness so we can go after the big fish and you know as well as I do the Grand Jury can say no. [p.15]

* * *

[Prosecutor B]: Let me say this to you. * * * As I see it, the picture as it presently stands, there is one question pending. Did you or did you not commit perjury when you testified before the grand jury. Now in the event that you did, and you know the answer to this, the next question is: is the Grand Jury going to indict you for the perjury that you committed if you did commit it." [p.16]

[Prosecutor A]: Let me tell you this. If it came out the way I hoped it would today, and still hope it will, that you tell the truth, I would ask you to tell it to us first, and then when the Grand Jury comes back from lunch and after you have had lunch I will ask you to tell it to the Grand Jury. After that if you wanted to cooperate, and this would be strictly a voluntary thing, I would ask you to call the old man or Forte's lawyer, or both, and I would like to be listening in or have some detective listening in on the other extension, and we would have a case that would be so tight. [p.17] [p.18]

Mrs. Gross: Uh hum.

[Prosecutor A]: And you would be in a position of being the cooperative government witness in the eyes of everyone at that point.

Mrs. Gross: Uh hum.

[Prosecutor A]: You can picture how tight the case is at that point. Because the call will be expected.

Mrs. Gross: Well I don't know.

[Prosecutor A]: Well –

Mrs. Gross: I don't know anything about that. I wouldn't even know where to call. I really don't know anything about that.

[Prosecutor A]: Well we can give you a couple of numbers."

[p.59] [Prosecutor B]: Did he know you were coming down to D.C. to testify?

Mrs. Gross: Yes.

[Prosecutor B]: What did he say about that?

Mrs. Gross: I'll call you tomorrow evening.

[Prosecutor B]: Did he? That is today?

Mrs. Gross: That is today, yes. Ten o'clock in the morning.

[Prosecutor B]: Is he going to call you tonight?

Mrs. Gross: I guess he will.

[Prosecutor B]: Can we have somebody there?

Mrs. Gross: Sure."

* * *

[p.60] [Prosecutor A]: You're agreeable to somebody being there?

Mrs. Gross: Yes.

[Prosecutor B]: You got two phones in the house?

Mrs. Gross: Yes.

[Prosecutor B]: Maybe we can sort of operate to set up to make a recording?

[Prosecutor A]: It will be the fairest thing to you, too.

Mrs. Gross: It don't matter, I've told you everything. There isn't anything else really, honest there isn't. There's nothing else I can tell you that would help you with him or with Wallace because I don't know.

2. Excerpts of Second Appearance of Mrs. Gross before Grand Jury, March 1, 1963.

* * *

[p.4] [By the Prosecutor]

Q. I have no other questions at this time. There are three hours of questions and answers, thereabouts, that we can have read to the Grand Jury from the transcript that came before. Based on that if you all have any questions

that you would like to ask Mrs. Gross we can have those questions answered. Is there anything of immediate information of Mrs. Gross, Mr. Deputy Foreman or ladies and gentlemen, that you would like to ask?

Deputy Foreman: I have no questions.

By [Prosecutor A]:

Q. Just before the Grand Jury then one final thing. You did say, didn't you Mrs. Gross, that since you have come forward and told the truth now you would also be agreeable to having someone listen in on your extension phone tonight should Forte call you? [p.5]

A. [Mrs. Gross] The only trouble with that is my husband doesn't know anything about this, and if somebody would have to tell him I –

Q. – I think in fairness I should advise you if this Grand Jury matter results in an indictment of anyone it is going to be public information anyway. The possibility of your husband learning is extremely great. You can think that over yourself as a practical person.

A. I still would not like it in my house, I wouldn't.

Q. You see, we have no legal way of doing it except in your house?

A. Well, I was not going to answer the phone this evening because I don't want to have anymore conversation and I was going to New York today – that's my home– but I couldn't because I had to come here, and I know I'm going tomorrow. I'm not answering the phone tonight and if he knows I'm here he's just liable not to call.

Q. I have no way at all of forcing the answer from you. It has to be your personal choice.

A. I don't.

Q. Do you have any objection of making a telephone call to Mr. Forte before leaving Washington and chat with him on the phone, as well as one with James Laughlin and chat with him on the phone?

A. I would rather not. [p.6]

Q. I understand that you would rather not, but your cooperation –

A. – If I had to I would but if I don't have to I wuld rather not.

Q. On the record let me put this to you, all we want is the truth, you don't have to make those telephone calls?

A. I have told you the truth.

Q. Fine, but the thing we talked about on the record down in [the Prosecutor B's] office I'll say it right before the Grand Jury. I said to Mrs. Gross that the big fish behind an operation like this are the ones who are most guilty. The only possible way of getting the people who are putting up the money and instigating the plans of this operation is by the cooperation of someone who is in between, that is the only way to make the case on the big people. We need Mrs. Gross' cooperation and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation. You would not have to make the telephone call. You see my point?

A. I know your point very well. I understand your point very well.

Q. Mrs. Gross, you are an experienced police woman?

[p.7] A. I am, very.

Q. You know the point?

A. I realize your point but I say I wuld rather not. If I did not have to I would rather not. If I had to I would. There is nothing I can do.

Deputy Foreman: [Prosecutor A], I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room, that we'll go after him. We prefer the big

ones but if they make it impossible for us to get the big ones we'll get the little ones.

[Prosecutor A]: Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?

A. Okay.

[Prosecutor A]: Thank you very much for your cooperation in telling the truth today.

(Witness was excused.)

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No. 1088

In the Supreme Court of the United States

OCTOBER TERM, 1967

JAMES J. LAUGHLIN AND ALLAN U. FORTE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1088

JAMES J. LAUGHLIN AND ALLAN U. FORTE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1) affirming the conviction of both petitioners under an indictment charging conspiracy and corrupting a witness is reported at 385 F. 2d 287. The prior opinion of the court of appeals is reported at 344 F. 2d 187.

The *per curiam* opinion of the court of appeals (Pet. App. A–15) affirming the conviction of petitioner Laughlin under a separate perjury indictment is reported at 385 F. 2d 295. The opinions of the district court relating to an earlier perjury indictment are reported at 222 F. Supp. 264, 223 F. Supp. 623 and 226 F. Supp. 112.

293-614—68

JURISDICTION

The judgments of the court of appeals were entered on July 28, 1967. A petition for rehearing *en banc* was denied on December 26, 1967. The Chief Justice extended the time for filing a petition for a writ of certiorari to February 5, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment (charging conspiracy and corruption of a witness) should have been dismissed on the ground that the grand jury heard illegally obtained evidence.

2. Whether petitioners can require exclusion of the trial testimony of a government witness on the ground that extra-judicial admissions previously made by the witness were coerced.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the District of Columbia under an indictment charging that they conspired with Bernice Gross, an unindicted coconspirator, to corrupt Jean Smith, a material witness in an abortion trial, and with the substantive offense of corrupting the witness. They were sentenced to imprisonment for 20 months to 5 years on each of the counts, the terms to run concurrently, and were fined $10,000 on the conspiracy count. Petitioner Laughlin was also convicted by a second jury under a second indictment charging that he committed perjury before the grand jury in

testifying that he did not know Bernice Gross, had never talked to her about the abortion case and had never talked to her over the telephone. He was sentenced to imprisonment for 20 months to 5 years, the term to run concurrently with the sentence on the first indictment. The court of appeals affirmed both convictions (Pet. App. A–1, A–15).

The sufficiency of the evidence is not challenged. The evidence is therefore summarized only briefly and in order to provide background for the contentions raised:

1. *The prosecution against both petitioners for conspiracy and corruption of a witness.* In September 1961, petitioner Forte was charged with violation of the District of Columbia abortion statute (22 D.C. Code § 201). In May 1962, while this case was pending in the district court, Forte communicated with Bernice Gross, a recently dismissed member of the abortion squad of the Baltimore Police Department, who had interviewed Mrs. Smith, the abortion victim, in the course of her duties. Forte engaged Mrs. Gross to induce Mrs. Smith not to identify him at the trial. Mrs. Smith, however, refused to lie (C. Tr. 238–243).[1]

In October 1962, Forte notified Mrs. Gross that petitioner Laughlin, his attorney, would get in touch with her (C. Tr. 243–244). Thereafter, Laughlin met Mrs. Gross at the department store where she was employed. When Mrs. Gross told Laughlin that Mrs. Smith said she would not lie, Laughlin replied, in

[1] "C. Tr." refers to the transcript of the trial in the conspiracy case. "P. Tr." refers to the transcript of the trial in the perjury case.

substance, that this was ridiculous (C. Tr. 245–248). Subsequently, at the request of petitioners, Mrs. Gross had Mrs. Smith write letters to the United States Attorney designed to bring about a dismissal of the abortion case. Mrs. Gross also delivered money to Mrs. Smith provided by Forte (C. Tr. 249–252, 258–262, 267–277). On one occasion, after Mrs. Gross told Laughlin that Mrs. Smith should be paid for writing a letter, Laughlin said he would speak to Forte (C. Tr. 275–276).

Mrs. Gross testified about her meetings and telephone conversations with petitioners. Evidence corroborating her testimony included telephone company records kept in the regular course of business (C. Tr. 1240–1242, 1652–1675), the letters sent by Mrs. Smith and the testimony of Mrs. Smith (C. Tr. 65–88).

2. *The prosecution against petitioner Laughlin for perjury.*

On February 20, 1963, Forte was acquitted by a jury under the abortion indictment. Thereafter, the January 1963 grand jury conducted an investigation to determine whether there had been any obstruction of justice during that trial. On March 6, 1963, petitioner Laughlin appeared as a witness before the January 1963 grand jury. When asked if he knew Bernice Gross, he replied that he would not know her if he met her on the street. He also denied that he had ever talked to Mrs. Gross about the abortion case or that he had ever talked to her over the telephone (P. Tr. 104–107). Mrs. Gross testified to her meeting with petitioner Laughlin at the department store

where they spoke about Jean Smith. Mrs. Gross also told about the numerous telephone conversations that she had with Laughlin (P. Tr. 382–387). Her testimony was again corroborated by telephone company records made in the regular course of business (P. Tr. 1852 *ff.*).

ARGUMENT

1. On March 1, 1963, two Assistant United States Attorneys informed Mrs. Bernice Gross that they had evidence that she had just lied to the grand jury and advised her that she had a right to talk to a lawyer before speaking to them. Mrs. Gross then admitted that she had given false testimony, repeating this admission when she reappeared before the grand jury the same afternoon. The prosecutor asked her to telephone petitioners while someone listened on an extension telephone, pointing out that the grand jury's decision whether to indict her would depend upon her cooperation. The deputy grand jury foreman also asked for her cooperation, stating that the grand jury preferred to go after the persons primarily responsible for wrong-doing, but that if lack of cooperation of witnesses makes "it impossible for us to get the big ones we'll get the little ones" (Pet. App. C–11). Thereafter Mrs. Gross made four telephone calls to petitioner Laughlin in which the topic of conversation was either her grand jury testimony or Jean Smith, the prosecutrix in the abortion trial. These conversations were recorded in the office of the United States Attorney.

During the first trial of the perjury case against petitioner Laughlin, the district court found that Mrs. Gross' consent to the recordings was not voluntary

and was not the authorization contemplated by the Federal Communications Act (47 U.S.C. 605). It, therefore, held that these recordings were not admissible in evidence. 222 F. Supp. 264. Subsequently, it dismissed the perjury indictment, concluding that, in the absence of the recordings, there was insufficient evidence before the grand jury to sustain the indictment.[2] It refused, however, to dismiss the conspiracy and corruption indictment against both petitioners on that ground. 223 F. Supp. 623; 226 F. Supp. 112. In May 1965, petitioners again moved to dismiss this indictment, on the ground that unlawful evidence was used before the grand jury. The court denied this request.

This ruling was clearly correct. As the court of appeals said (Pet. App. A–7), "there was ample competent evidence before the grand jury to justify bringing the defendants to trial on the conspiracy charge." The fact that some evidence was subsequently held to be inadmissible does not vitiate the indictment. *Holt* v. *United States,* 218 U.S. 245; *Costello* v. *United States,* 350 U.S. 359; *Lawn* v. *United States,* 355 U.S. 339.

There is no occasion for this Court to reexamine these decisions. Only recently, in *United States* v. *Blue,* 384 U.S. 251, 255, this Court held that the remedy for suppressing illegally obtained evidence does not extend to barring the prosecution altogether: "So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the

[2] The present perjury conviction arises out of a subsequent grand jury indictment.

public interest in having the guilty brought to book." This principle is equally applicable to an extension of the exclusionary rule to grand jury proceedings, as was recognized in a footnote to the Court's unanimous opinion (384 U.S. at 255, n. 3):

> It does not seem to be contended that tainted evidence was presented to the grand jury; but in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See *Costello* v. *United States,* 350 U.S. 359; *Lawn* v. *United States,* 355 U.S. 339; 8 Wigmore, *Evidence* § 2184a, at 40 (McNaughton rev. 1961).

2. At the joint trial on the conspiracy and corruption charges, which commenced on June 2, 1965, petitioners attempted to prevent Mrs. Gross from testifying, contending that she was being coerced (C. Tr. 201–204, 217–222). Before permitting her to testify, the trial court specifically advised her that she need not testify against herself. When Mrs. Gross, a former policewoman, indicated her understanding of her rights and her willingness to testify, the court ruled that she could testify (C. Tr. 228–231). At the subsequent perjury prosecution against petitioner Laughlin alone, the court appointed an attorney to represent Mrs. Gross to make certain that she understood her rights. The trial judge also explored this matter with Mrs. Gross. Thereafter, Mrs. Gross asserted that she was willing to testify (P. Tr. 332–342). During her testimony, she said that she knew that she was not obliged to give testimony (P. Tr. 1461).

Petitioners clearly had no standing to prevent Mrs. Gross from testifying. See *Wong Sun* v. *United States,* 371 U.S. 471, 492. Neither the fact that Mrs. Gross was named as a coconspirator in one of the indictments, nor the fact that she had previously testified falsely before the grand jury, made her incompetent to testify at the trial as a government witness. These were matters for the jury to consider in assessing her credibility as a witness but are not a basis for disqualification. Mrs. Gross was in fact fully cross-examined on this point at both trials. Cases dealing with the admissibility of confessions or other testimony or evidence procured out of court (Pet. pp. 21–26) obviously are inapposite.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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PETITIONERS' REPLY BRIEF

JAMES F. FITZPATRICK
1229 Nineteenth Street, N. W.
Washington, D. C.

RALPH J. TEMPLE
1424 Sixteenth Street, N. W.
Washington, D. C.

Attorneys for Petitioner

Of Counsel:

WM. WARFIELD ROSS
National Capital Area Civil Liberties Defense and Education Fund
LAWRENCE SPEISER
MELVIN L. WULF
American Civil Liberties Union

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PETITIONERS' REPLY BRIEF

A. USE OF ILLEGAL WIRETAP EVIDENCE BEFORE GRAND JURY

The Government does not dispute that the Grand Jury received, considered, and relied upon illegal wiretap evidence in returning the conspiracy and corruption indictment against petitioners. In this regard, the Government itself has asserted that the Exclusionary Rule bars use by prosecutors of illegally-seized evidence:

> ". . . Commencing with *Weeks v. United States*, 232 U.S. 383, and continuing to the present day, the method by which the Court has enforced constitutional restraints on law-enforcement officials has been the rule of exclusion – denying to the prosecuting authority the benefits of improperly obtained evi-

> dence. . . ." Brief for the United States in Opposition, *Battaglia v. United States*, No. 867, O.T. 1967, p. 14.

Petitioners assert that, consistent with this principle, the Government should not be entitled to secure an indictment based upon the presentation of illegal wiretap evidence to the grand jury.

It should be noted that application of the Exclusionary Rule to grand jury proceedings does not require "barring the prosecution altogether," as the Government claims. Brief for the United States, p. 6. A grand jury can consider reindicting petitioners – but *not* on the basis of the illegal wiretap evidence.

The Government's reliance on the *Costello* doctrine – involving the use of hearsay evidence, not illegal wiretap evidence – results in a "harmless error" rule contrary to *Chapman v. California*, 386 U.S. 18 (1967); and *Fahy v. Connecticut*, 375 U.S. 85 (1963). *Chapman* confirmed that one cannot treat,

> ". . . as harmless those constitutional errors that 'affect substantial rights' of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. . . ." 386 U.S. at pp. 23-24.

Under the *Chapman* standard, one cannot disregard the impact of the use of illegal evidence upon the grand jury merely because *other* legal evidence might have been presented to the grand jury.

B. DEFENDANTS' STANDING TO EXCLUDE COERCED INCRIMINATING TESTIMONY OF A WITNESS

This Court recently acknowledged that, in light of recent decisions, there is a sound basis to review the "standing" doctrine of *Wong Sun v. United States*, 371 U.S. 471 (1962), relied upon by the Government here. In a decision released on March 18, 1968, the Court stated:

> "It has been suggested that the adoption of a 'police-deterrent' rationale for the exclusionary rule, see *Linkletter v. Walker*, 381 U.S. 618, logically dictates that a defendant should be able to object to the admission against him of *any* unconstitutionally seized evidence. See Comment, Standing To Object to an Unreasonable Search and Seizure, 34 U.Chi.L. Rev. 342 (1967); Note, Standing to Object to an Unlawful Search and Seizure, 1965 Wash.U.L.Q. 488. However, that argument is not advanced in this case, and we do not consider it." *Simmons v. United States*, __ U.S. __ (1968).

The instant Petition, of course, raises that very issue.

Moreover, the significance of the standing question raised in this Petition is underscored by the Court's recent grant of certiorari in *Mancusi v. DeForte*, No. 844, certiorari granted, January 23, 1968, where the primary issue is the appropriate criteria of standing to raise constitutional issues. *Mancusi* involved standing to raise Fourth Amendment rights against unlawful search and seizure; this identical question arises here in the context of Fifth Amendment rights against

coerced confessions. Certiorari should be granted to consider this important question.

Respectfully submitted,

JAMES F. FITZPATRICK
1229 Nineteenth Street, N. W.
Washington, D. C.

RALPH J. TEMPLE
Suite 501
1424 Sixteenth Street, N. W.
Washington, D. C.

Attorneys for Petitioner

Of Counsel:

WM. WARFIELD ROSS
National Capital Area Civil
Liberties Defense and
Education Fund

LAWRENCE SPEISER
MELVIN L. WULF
American Civil Liberties Union

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